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October 11, 2017

Hon. Margo K. Brodie
United States District Court
for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *North American Soccer League, LLC v. United States Soccer Federation, Inc.*, Case No. 1:17-cv-05495

Dear Judge Brodie:

Defendant United States Soccer Federation ("USSF") requests a pre-motion conference in order to file a motion to dismiss the North American Soccer League's ("NASL") complaint.

I. Background

This case is about the decision made by the USSF's Board of Directors not to sanction NASL as a Division II league for 2018. NASL concedes that it does not meet the Professional League Standards ("PLS") for Division II status—indeed, it has failed to do so almost every year since it began operations in 2011. It is only through USSF's yearly-granted waivers that NASL has participated as a professional Division II soccer league at all. The waivers, however, were temporary solutions meant to facilitate NASL's development. USSF conditioned those waivers on NASL growing its league and coming into actual compliance with the applicable standards. That has not happened. In fact, while other leagues like Major League Soccer (Division I) and the United Soccer League (once Division III, now Division II) have flourished in recent years, NASL has declined. Despite multiple chances, NASL has not even come up with *a plan for eventual compliance* with the Division II standards.

In January 2017, USSF gave NASL one final chance to comply with the Division II standards. USSF granted NASL provisional Division II status for 2017, but conditioned that approval on NASL complying or providing a plan for full compliance with the PLS. NASL ignored that warning. When NASL applied for Division II status for 2018 earlier this year, it acknowledged once again that it did not meet the standards for such status and needed waivers. USSF's Board determined "enough is enough" and denied NASL a Division II sanction for 2018, but gave NASL 30 days to apply for Division III status—a deadline NASL ignored.

As these facts make clear, this case has nothing to do with the antitrust laws. It has to do with a flawed league that does not like USSF's decision denying it Division II status, and wants this Court to step in and override that decision. Indeed, that is precisely the "preliminary relief" NASL requests. NASL attempts to create an antitrust case where none exists by claiming that the implementation and promulgation of the PLS were part of a conspiracy to drive NASL out of

business. But the undisputed facts, which are subject to judicial notice, are that the PLS that NASL challenges were developed 15 years before NASL was formed. And, the revisions to the PLS in 2008, 2010, and 2014, were proposed not by separate economic actors as part of an antitrust conspiracy, but rather by an independent task force appointed by USSF's Board of Directors. When the task force presented its proposal to the USSF Board of Directors, all directors affiliated with professional leagues or teams were recused and did not vote. The same was true for the decision to grant NASL "provisional" Division II status for 2017, and the September 1, 2017 decision to reject NASL's bid for Division II status for 2018. Instead, these decisions were made by directors representing youth soccer, adult amateur soccer, non-recused athletes (as required by federal law) and unaffiliated directors such as Donna Shalala, former Secretary of Health and Human Services, Val Ackerman, the first President of the WNBA and current Commissioner of the Big East conference, and former Goldman Sachs executive Carlos Cordeiro. For those reasons, it is perhaps not surprising that nowhere does NASL identify any specific co-conspirators who entered into an agreement with respect to NASL.

Moreover, the purported rationale behind this supposed conspiracy—to keep NASL from competing with MLS as a Division I league—is nonsensical. Since its inception, NASL has never consistently met the standards for Division II status. And by its own admission, NASL has no current plans to compete with MLS, but rather hopes "to build so that it can eventually compete against MLS." (Compl. ¶ 14). Under these facts, the inference that USSF would conspire to drive NASL out of business is implausible. And of course, if USSF were bent on driving NASL out of business, why has it given NASL yearly waivers to allow it to participate as a Division II league and thereby assist NASL in trying to grow?

In the coming weeks, this Court will determine whether granting NASL the affirmative, mandatory injunction that it seeks, *i.e.*, to be sanctioned as a Division II league for 2018, is appropriate. In connection with that analysis, the Court will need to analyze whether NASL's complaint is considerably more likely to succeed on the merits than not. *See Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010); *Selkin v. State Bd. for Prof'l Med. Conduct*, 63 F. Supp. 2d 397, 401 (S.D.N.Y. 1999) (plaintiff's cause of action had to be "considerably more likely to succeed than fail" to obtain a mandatory injunction) (internal citation omitted). But as the above makes clear, far from having any likelihood of succeeding on the merits, NASL's case is so factually and legally infirm that it should not be permitted to proceed beyond the pleading stage.

II. Bases for Dismissal of NASL's Complaint

Several fundamental flaws with NASL's complaint require its dismissal. *First*, the alleged conspiracy is implausible. Obviously, NASL cannot attack the promulgation of the PLS in 1995. The target of the alleged conspiracy (NASL) did not even exist then—and laches foreclosed an injunctive claim long ago. *See, e.g.*, *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc.*, 988 F.2d 587, 589, 594 (5th Cir. 1993) (conspiracy claim failed because the defendant had "a consistent policy of selling its products only through salons" that was in existence "long before the events at issue"); *Rite Aid Corp. v. American Exp. Travel Related Servs. Co., Inc.*, 708 F. Supp. 2d 257, 272 (E.D.N.Y. 2010) (observing that "a four-year period of

laches applies" to "claims for equitable relief" under the antitrust laws). Nor can NASL challenge USSF's implementation of those standards, since it alleges no facts showing that an agreement to drive NASL out of business arose at any time. Instead, NASL asks the Court to infer a conspiracy from the fact that Major League Soccer, like NASL and every other professional soccer league in the U.S., is a member of USSF. But those allegations are legally insufficient. Membership in an industry body does not support an inference of conspiracy as a matter of law. *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 233-34 (2d Cir. 1999). Moreover, the MLS (and all other professional team or league representatives) were recused from all PLS votes and from the vote on September 1, 2017 denying NASL a Division II sanction for 2018. *See Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 397 (7th Cir. 1993) (trade associations are not a "walking conspiracy" and affirming grant of summary judgment where associations followed normal procedures).

Second, as noted above, NASL's claims almost exclusively concern a purported conspiracy aimed at maintaining MLS's status in the market for top-tier professional soccer in the U.S. and Canada. But NASL has no standing to assert such claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Top-tier professional soccer in the U.S. and Canada is not a market in which NASL currently participates, nor is it a market that NASL alleges it is ready to enter. *See Fido's Fences, Inc. v. Radio Systems Corp.*, 999 F. Supp. 2d 442, 450 (E.D.N.Y. 2014). In order to have standing to claim harm in a market, a plaintiff cannot merely assert vaguely that it "eventually" plans to enter that market, but rather must plead that it is ready, willing and able to enter that market. *Id.; Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 553–54 (S.D.N.Y. 1980) (dismissing antitrust claims for failure to allege facts from which preparedness can be inferred); *see also Arista Records LLC v. Lime Group LLC*, 532 F. Supp. 2d 556, 567 n.13 (S.D.N.Y. 2007). NASL's failure to even attempt to plead intent and preparedness to enter the market for top-tier professional soccer is fatal to the majority of its claims.

Finally, virtually all of plaintiff's allegations concern past injury. Not only is that evident from the body of the complaint, which alleges harm from PLS promulgated and implemented 22 years before the complaint was filed (*see* Compl. ¶ 76), but also from the Claims for Relief, which almost exclusively discuss harm suffered by NASL in the past tense (*see, e.g.,* Compl. ¶ 205 ("This contract . . . has led to significant anticompetitive effects"); ¶ 209 ("The USSF's anticompetitive conspiracy has directly and proximately caused antitrust injury")). Because NASL has not sued for past damages, but only injunctive relief, it does not have standing to assert those claims. As the Second Circuit has recognized, "to meet the constitutional minimum of standing" for injunctive relief, a plaintiff "cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he . . . will be injured in the future." *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) (internal quotation marks and citations omitted).

NASL's claims suffer from glaring defects. The Court should allow USSF to move to dismiss the complaint, such that its "basic deficiency [can] be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citation omitted).

Respectfully submitted,

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cc: All counsel of record (via ECF)